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In the Supreme Court of the United States

No. 252

OCTOBER TERM, 1959.

JOSEPH D. MASTERSON,
Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinion of the District Court on motion for new trial, so far as we know, is not reported in any official or unofficial reports. It appears, however, on pages 120a-124a, of the Record, nine extra copies of which are filed herewith. The opinion of the Court of Appeals is reported at 266 F. 2d 1, and is appended hereto at page 18.

The judgment sought to be reviewed was entered on May 5, 1959 (*infra*, p. 18).

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Where the Record shows that petitioner's complaint in an action under the Federal Employers' Liability Act of April 22, 1908 (Chapter 149, 35 Stat. 65; U. S. C. A. Title 45, Chapter 2, §§ 51-60) and the Federal Safety Appliance Act (Title 45 U. S. C. A., § 1 et seq.), and the

amendments thereto, alleged "unlawful conduct and negligence," that he testified at trial that on a dark and misty night, with his head, as his duty required, stuck out of the window of a caboose, looking at the 153-car moving train, he saw that from a part of the train under the exclusive control of respondent, and about 100 feet ahead of him, sparks appeared and then an object flew out, ricocheted on an adjoining parallel track, and an instant later struck him and knocked him unconscious (a period of unconsciousness variously estimated from one half hour to one and one-quarter hours) that for some 50 days immediately following the occurrence, he stated repeatedly that he did not know just what it was which struck him, that suddenly about 50 days after the occurrence, he remembered that it was a piece of a brake shoe that had hit him, and it is shown that eight days after the occurrence, in response to a question by respondent's investigator, petitioner stated that it was his idea or opinion that it was a part of a brake shoe that ricocheted off the rail and hit him, an utterance petitioner did not recall but did not deny, that no trains were moving on tracks in the immediate vicinity, that there were no close clearances in the area and the object which hit him was not found, did the trial court commit prejudicial error in refusing petitioner's request to charge on res ipsa loquitur as well as under the Federal Safety Appliance Act?

2. Where the trial court, having refused petitioner's request for a charge on res ipsa loquitur, submitted the case to the jury under the absolute liability doctrine of the Safety Appliance Act only, and counsel for petitioner, therefore, confined his argument to that issue alone, and the jury, during its deliberations, inquired in writing, "If we find the railroad not negligent, can we still award damages to Mr. Masterson? * * *", whereupon the Court,

after telling the jurors that it seemed to him that they had not paid any attention to "the charge of the court or the argument of counsel," again charged solely on absolute liability, and the jury, thereafter, returned a verdict for the defendant, did the trial court commit prejudicial error in denying petitioner's motion for new trial because petitioner was denied a fair trial by the jury, as evidenced by its question?

STATUTES INVOLVED.

Pertinent text of the Federal Employers' Liability Act, as amended (45 USCA § 51-60, 10 FCA title 45, § 51) reads:

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (§ 51.)
>
> "* * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee * * *." (§ 53.)
>
> "* * * such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *." (§ 54.)

Pertinent text of the Federal Safety Appliance Act, 45 U. S. C. A. 11; 160 § 2, 36 Stat. 298, reads:

"It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections, not equipped with appliances provided for in said sections, to-wit: all cars must be equipped with * * * efficient hand brakes. * * *"

STATEMENT OF THE CASE.

Respondent's answer admits that this action arises under the Federal Employers Liability Act and the Federal Safety Appliance Act (3a, 5a).

Petitioner, in the performance of his duty, put his head out of a window in the caboose of a 153-car westbound train. The caboose was the hindmost piece of equipment.

It was a dark and misty night (42a).

He was struck by a flying object while his head was out of the window (33a). He fell back unconscious into the caboose. The window closed after him, from his left to his right (80a). He received a laceration 1½ to 2 inches long on his right forehead, just above his eye. He remained unconscious for a period variously estimated from one-half hour to one and one-quarter hours.

A search of the caboose failed to reveal any object which may have struck him (82a).

There were tracks to the north of where petitioner was injured (43a). No trains were moving on those tracks at that time (43a).

There were no close clearances in the area (43a).

Other than the men in the caboose and such men of the crew who were up front, there apparently was no person in the vicinity (87a).

Frequently he was asked what hit him and he answered that he did not know.

On December 13, 1956, eight days after he was hurt, he was interviewed at a hospital by respondent's investigator accompanied by a reporter. On this occasion petitioner stated in effect that he did not know what hit him.

Then he was asked these questions and he made these answers:

> "Q. What is your idea as to what caused this? Do you think you bumped yourself against the side of the caboose or something hit you?
>
> A. Something definitely hit me.
>
> Q. Do you have any idea what it was?
>
> A. Do you want my idea?
>
> Q. Your opinion.
>
> A. I think it was part of a brake shoe that ricocheted off the rail and hit me." (92a.)

On January 24 or 25, 1957, approximately fifty days after he was injured, petitioner, while at a hospital, told a railroad doctor there that he suddenly remembered that it was a piece of a brake shoe which had hit him.

At trial, plaintiff testified that just before the caboose entered a straight stretch of track, he saw sparks flying from the leading trucks of the second hind car, or the trailing trucks of the third hind car. This meant there was something wrong with those particular cars. To get a better look he leaned out slightly further. An object flew out from the "region of the wheels where the sparks were flying," ricocheted on the adjoining parallel track, and hit him (32a, 33a).

Just before the object hit him, he testified at trial, he observed that it was a piece of a brake shoe about 2 inches long, 2 inches wide, and ½ inch thick (53a).

He exercised no control with respect to the area from which the object flew out.

In the area from which the object flew out, there were quite a number of parts (49a, 75a).

He readily admitted that up until January 24 or 25, some fifty days after he was hurt, he repeatedly had stated that he did not know what it was that hit him (63a, 64a).

He remembered the occasion when he was interviewed on December 13, 1956. He did not remember any of the specific questions which were put to him or the answers which he gave, but he did not question the correctness of what was reported as the questions put and the answers given on that occasion.

Before summation, petitioner requested in writing that the trial court charge that the doctrine of res ipsa loquitur applied, if the jury found by a fair preponderance of all of the evidence of the case that something which was part of the train and was under the exclusive control of the respondent, and with respect to which the petitioner exercised no control, struck and injured him.

This request was rejected.

Counsel for petitioner, accordingly, confined summation to the matter of absolute liability under the Safety Appliance Act.

After deliberating for some considerable time, the jury returned with this question:

> "If we find the Railroad not negligent can we still award damages to Mr. Masterson for the reason he was injured while an employee of the Railroad and they should be held responsible for his injury?"

The trial court stated:

> "I want to say I am very disappointed that you ask the question, because it seems to me you haven't paid any attention to the charge of the court or the argument of counsel." (118a)

The trial court then instructed the jury again that if it believed petitioner's identification of the object as a

piece of a brake shoe, he was entitled to a verdict. Otherwise, its verdict was to be for the respondent.

The jury then returned a verdict for respondent and judgment was entered upon that verdict.

Petitioner duly filed his motion for new trial. This was denied in a written memorandum.

The Court of Appeals for the Third Circuit affirmed and adopted the views of the trial court that the request to charge res ipsa loquitur was correctly refused because inconsistent with the allegations in the complaint as well as inconsistent with the position taken by plaintiff and his counsel throughout the trial and because not warranted by the evidence introduced during the trial.

Federal jurisdiction in the court of first instance is predicated upon the Federal Employers Liability Act and the Federal Safety Appliance Act.

ARGUMENT.

The Court of Appeals in this case decided an important question of federal law which specifically has not been but should be settled by this court and it has decided a federal question in a way in conflict with the philosophy of decisions of this Court.

In the Record, after all the testimony had been received, there was an evidentiary basis for the conclusion that the object which struck petitioner flew out from an area of the train under respondent's exclusive control and was either a piece of a brake shoe or something other than a piece of a brake shoe.

The dark, misty night, and the very short lapse of time between the instant the object flew out from the train and the instant it struck petitioner, made identification difficult.

Petitioner's "idea" or "opinion" expressed eight days after the occurrence may have blossomed into an honest, though wrong, belief forty-two days later.

Petitioner's admissions that for approximately fifty days after the occurrence, he had stated repeatedly that he did not know just what it was which struck him, furnished respondent with a strong argument against acceptance of his testimony that it was a piece of a brake shoe which hit him.

It is fundamental that a jury may believe all or any part of the testimony of any witness.

The jury, accordingly, could believe petitioner's testimony that the object came from a part of the train under exclusive control of respondent though the jury reject his testimony that the object was a piece of a brake shoe.

Petitioner's request to charge on res ipsa was consistent with his testimony anent the physical conditions which obtained at the time of the occurrence, his testimony anent exclusive control in the respondent in the area from which the object which struck him flew out, his admission that eight days after the occurrence he stated that it was only his "opinion" that what struck him was part of a brake shoe, and his admission that for some fifty days after the occurrence he had stated repeatedly that he did not know what struck him.

We submit that the fact that petitioner testified as to his belief anent identification of the object which struck him, permitting recovery under the Safety Appliance Act, should not necessarily foreclose his right to go to the jury under the doctrine of res ipsa loquitur, where there exists in the Record an evidentiary basis for submission to the jury of the issue of negligence under such doctrine.

The trial court and the Court of Appeals in the case at bar have decided that a railroad man, bringing his action

under the Federal Employers' Liability Act and the Federal Safety Appliance Act, is limited to the Safety Appliance Act claim even though the Record is such as presents an evidentiary basis for the application of res ipsa loquitur.

Respondent's position is that *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U. S. 384; 70 S. Ct. 200, sustains this view.

We submit respectfully that *O'Donnell* does no such thing.

O'Donnell is authority for the proposition that where the thing causing the injury is shown to be covered under the Safety Appliance Act, to show negligence with respect to such thing is to add nothing to the direct case under the Safety Appliance Act.

Thus, in the case at bar, were the thing which injured petitioner, without question, a part of a brake shoe, it would add nothing to his case under the Safety Appliance Act, to show that respondent was negligent with respect to such brake shoe.

At the risk of unwarranted repetition, we reiterate plaintiff's position that in the state of the Record in this case, the jury could well have found that the thing which caused injury was not a part of a brake shoe (thus eliminating a Safety Appliance Act violation) but that nevertheless it was, indeed, a part in the exclusive control of respondent, which detached from the train and caused plaintiff's injury.

In this situation, the doctrine of *O'Donnell* would be wholly inapropos, and the res ipsa loquitur doctrine with its attendant negligence concept would, indeed, become apropos.

The view of the courts below in this case is in conflict with the expression of this Court in *Rogers v. Mo.*

P. R. R. Co., 352 U. S. 500; 1 L. Ed. 2d 493, where this Court clearly stated:

> "The test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought * * * whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury."

The view of the courts below is in conflict with *Jesionowski v. B. & M. R. R.*, 329 U. S. 452, where it was held that whether the railroad was in exclusive control of the factors which may have caused the accident was for the jury to decide, and that once the jury, appropriately instructed, found the railroad to be in such an exclusive control, the jury was authorized to find negligence from the fact that the accident occurred.

The jury, in the case at bar, had a right to believe that the flying object came from a part of the train under respondent's control, and though the object was not a piece of a brake shoe, respondent was negligent under the res ipsa loquitur doctrine.

At pre-trial there was some discussion between counsel and the Court dealing with the Safety Appliance Act aspects of the case.

The discussion brought no definitive agreement on the matter of res ipsa loquitur.

At that time, neither petitioner nor his counsel knew that in the interview of December 13, 1955, petitioner had ventured the "opinion" that the object which struck him was a piece of a brake shoe.

Respondent used this testimony to argue forcibly that petitioner's testimony on trial was, in fact, only the fulfillment of an idea which had grown into a belief.

The investigator for the railroad who testified at great length with respect to the statement made by petitioner eight days after the accident was an effective witness, and his testimony unrefuted could well have had great weight with the jury.

Near the end of discussion at pre-trial anent res ipsa loquitur the trial court observed that

> "If he is looking out that car window and he is hurt by a flying object, I think it is up to the railroad to explain. I think he can get to the jury under F. E. L. A." (22a.)

Counsel for respondent, at that juncture, broke in with an irrelevant reference to a witness, and then the Court concluded the discussion anent the matter of res ipsa loquitur, with this observation:

> "That depends on testimony. You can't rule on that in advance." (22a.)

When the trial court rejected a charge on res ipsa he did not mention any understanding reached at pre-trial with respect to this matter. The colloquy on this subject is as follows:

> "The Court: As I see that, gentlemen, the res ipsa doctrine is merely a doctrine of evidence, that permits an inference of negligence. It is just a question of evidence. In this case we don't have any evidence of anything other than the brake shoe.
>
> Mr. Illig: That's right.
>
> The Court: It might be it was a piece of iron, broken spring. I don't know what all might have come out of there. But this fellow doesn't put it that way. If he equivocated, and said it came from there, but I am not sure whether it is a brake shoe or what it was, we would have a different thing. He says brake shoe period.
>
> Mr. Illig: As a practical matter, is the jury going to draw any distinction?" (103a.)

Would not the trial court have reminded petitioner's counsel at the time he presented the rejected request to charge that such request was inconsistent with his position on pre-trial had any definitive position been reached at pre-trial on that score?

Assuming arguendo that petitioner's counsel was of the impression that as matters stood at the time of pre-trial, he would prefer to go to the jury on the Safety Appliance Act phase of the case, would petitioner thereby be precluded from amending his position prior to trial?

At the time of pre-trial, petitioner's counsel had not yet obtained the transcript of the interview on December 13, 1956, between petitioner and McKinley, defendant's agent.

Were a situation to develop which would prompt petitioner's counsel to change his views as expressed at pre-trial with respect to the theory of liability, would it not be in the interest of fairness and justice to give petitioner an opportunity to avail himself of the change in thinking on that subject prior to trial?

Respondent could not be prejudiced in any way, shape, manner, or form by any such change, if any were made.

The Request for Charge Was Not Inconsistent with the Allegations in the Complaint.

The second paragraph of the complaint recites that the

"Instant action arises under and by virtue of the Federal Employers Liability Act * * * and the Federal Safety Appliance Act. * * *"

The third paragraph alleges

"* * * suddenly a part of a brake shoe on one of the cars of said train broke. * * *"

The fourth paragraph of the complaint recites:

"As a direct result of the unlawful conduct and the negligence of the defendant, he sustained * * * injury. * * *"

Paragraph 2 of the complaint, therefore, invoked both the Federal Employer's Liability Act and the Safety Appliance Act.

The third paragraph set forth the operative facts which would bring the action within the purview of the Safety Appliance Act.

The fourth paragraph refers not alone to the violation of laws set forth in the third paragraph, but also to "negligence," which has nothing to do with an action under the Safety Appliance Act but is the sine qua non of the right to recover under the Federal Employers Liability Act.

Rule 8f of the Federal Rules of Civil Procedure, reads:

All pleadings shall be so construed as to do substantial justice.

Courts should construe pleadings to give "effect to all its averments." *Barron and Holtzoff, Federal Practice and Procedure*, § 283, p. 536.

Vigor v. Chesapeake & O. Ry. Co., 101 F. 2d 865 (7th Cir. 1939), cert. denied, 307 U. S. 635 (1939), was a Federal Employers Liability Act-Safety Appliance Act case. The question was raised in that case whether or not the complaint was based upon negligence besides the Safety Appliance Act. The court stated:

"It must be conceded that the pleading is not a model one for that purpose, and that it more perfectly states a cause of action for violation of the statute. However, it alleges that the injury was caused by reason of the negligence and carelessness of the defendant in interstate commerce. It was not necessary to allege

negligence or carelessness in a suit based upon a violation of the statute, and appellant was therefore put upon notice that appellee was relying upon negligence and carelessness whether they were properly pleaded or not. Of course, it is not proper to plead different theories in the same paragraph, but it is not necessarily fatal especially when the adversary makes no objection. Here appellant raised no objection to the form or content of the complaint by demurrer or motion, and we think it is in no position to object after going to trial on the general issue." 101 F. 2d 865 at 869.

If indeed, therefore, pleadings are to be construed "as to do substantial justice" and all averments of the complaint shall be given affect, it is respectfully submitted that the complaint did, in fact, raise the issue of respondent's negligence and that the doctrine of res ipsa loquitur as a rule of evidence allowing the jury to infer negligence, is not inconsistent with or at all repugnant to the complaint.

Petitioner Was Denied the Fair Trial to Which He Was Entitled by the Obvious Lack of Understanding of the Issue submitted as Reflected in the Jury's Question.

The jury, in the case at bar, was confined by the court's charge to a consideration only of the absolute duty concept of the Safety Appliance Act.

The charge of the Court, as given, was consistent with the trial court's refusal to charge on res ipsa loquitur.

The summation of counsel for petitioner, therefore, omitted any discussion of the matter of negligence.

Despite the summation and the charge of the court, the jury, after deliberating for some time, came back with this question:

"If we find the railroad not negligent, can we still award damages to Mr. Masterson for the reason he was injured while an employee of the railroad and they should be held responsible for his injury." (R. 4.)

The court's response was:

"You have presented a question for further instruction. I want to say I am very disappointed that you ask the question, because *it seems to me you haven't paid any attention to the charge of the court or the argument of counsel.*" (Emphasis supplied.) (118.)

"I think it is clear to you, should have been clear to you, that this case was founded or left on the basis of the violation of the Safety Appliance Act, and any causal relation of that of the injury. That is if the brake shoe came off the trucks, as testified to by the plaintiff, if you accept that statement, accept his evidence, he is entitled to a verdict. It isn't a question of negligence in this case. I think that was made very clear. I thought I made that clear to you."

Out of the hearing of the jury, the court, after reading the question to counsel, added:

"That is rather discouraging to the court after all the charge, and especially the summation." (119a.)

It is plain that the jury was inattentive to the summation of counsel. For a substantial period of time, obviously, the jury had concerned itself with its own concept of negligence.

Petitioner's counsel had refrained from arguing the matter of negligence, because it was not in the case as submitted by the court.

Some one or more persons on that jury had directed consideration of the case to "negligence." This without benefit of a court's instructions, and without listening to

argument by counsel with respect thereto, and without any knowledge of the doctrine of res ipsa loquitur which would have permitted an inference of negligence to be drawn from the very happening of the occurrence.

Did the court's statement to the jury in response to the question asked by it cure the wrong committed by the jury?

We submit that it did not.

The jury had considered the case on the basis of its own concept of "negligence," without guiding instructions or argument pertinent to that subject.

For the court to express to the jury disappointment at its question, to tell the jury that it had paid no "attention to the charge of the court or the argument of counsel," understandably uttered, could well have evoked a measure of belligerence on the part of the jury. A rap on the knuckles sometimes galvanizes already formulated ideas into stubbornness. This is not a climate calculated to induce fairness and justice.

The court's admonition and further instruction certainly did not correct the jury's inattentiveness to the summation. No opportunity for further summation was, or in the very nature of things, could have been afforded.

It cannot be said that the ends of justice are served in a Federal Safety Appliance Act case where the jury reveals its failure to grasp even an iota of understanding of the philosophy of that Act, and where, in fact, it reveals that it has given consideration to decisive factors which are alien to the Act.

The trial court, in his memorandum overruling motion for a new trial, interpreted the question of the jury as evidence only of its consideration of a point on which it was uninstructed, in effect, a bit of surplusage.

This effort to rationalize his action in denying the motion does not stand the test of logic, or of reason. The view expressed by the court is inconsistent with his immediate reaction to the question posed by the jury. His view on motion for new trial is unreasonably strained and unwarranted by the plain language used by the jury.

The question indicates clearly that the jury did not consider the issue in the light of the Safety Appliance Act, but in the light of its own brand of "negligence," without the benefit of proper and pertinent instructions and argument thereon.

We submit that when the court stated, "It seems to me you haven't paid any attention to the charge of court or the argument of counsel," it recognized that the jury had not considered the case on the basis of the Safety Appliance Act.

Plaintiff, who has devoted practically all of his adult work life thus far to the defendant railroad, can find no solace in pious expressions that the Federal Employers Liability Act and Safety Appliance Act was designed for his protection, and that it is to be liberally construed in his favor as he ponders the fact that such purposes were thrown to the four winds.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Opinion of the United States Court of Appeals for the Third Circuit.

(Filed May 5, 1959.)

The only important question on this appeal is whether the request to charge res ipsa loquitur should have been granted.

Our own examination of the record completely satisfies us that Judge Willson correctly held in his opinion on the motion for a new trial that "The request for charge was refused because inconsistent with the allegations in the Complaint as well as inconsistent with the position taken by plaintiff and his experienced and able counsel throughout the trial and finally because not warranted by the evidence introduced during the trial."

The judgment of the District Court will be affirmed.

Judgment of the United States Court of Appeals for the Third Circuit.

(Filed May 5, 1959.)

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

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Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

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No. 252

JOSEPH D. MASTERSON,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent prays that the Petition for Writ of Certiorari presented by petitioner to review a judgment of the United States Court of Appeals for the Third Circuit, which affirmed a judgment of the United States District Court for the Western District of Pennsylvania, be denied.

Opinions Below

The opinion of the District Court is reported at 169 F. Supp., 435. The opinion of the Court of Appeals is reported at 266 Fed. 2d, 1.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Where petitioner's request for a charge on res ipsa loquitur was inconsistent with petitioner's pleadings, with his deposition, with petitioner's position at pre-trial, and with all of the evidence at the trial concerning the cause of his injury, did the Trial Court err in refusing said point for charge?

2. Where the only evidence of respondent's violation of the Safety Appliance Act was petitioner's positive testimony that he was struck by a piece of flying brake shoe, and petitioner concedes that the case was properly submitted to the jury under the Safety Appliance Act, can petitioner, after verdict for respondent, complain of the Court's refusal to charge the jury on res ipsa loquitur, based upon petitioner's belated claim that the cause of his injury may have been something other than a piece of brake shoe?

3. Where a jury returned its verdict for respondent only after additional instructions on the applicable law, to which no exception was taken by petitioner, and petitioner on motion for new trial did not contend that the verdict was against the evidence or the law as given by the Court, can petitioner complain of the jury's verdict on the basis of a question asked prior to the additional instructions?

Statutes Involved

The statutes involved are the Federal Employers Liability Act, as amended (45 U. S. C. A., § 51-60), and the Federal Safety Appliance Act, (45 U. S. C. A., § 11), the pertinent texts of which are set forth at page 3 of the Petition for Writ of Certiorari.

Statement

On the night of December 5, 1956, petitioner, a brakeman in the employ of the New York Central Railroad, sustained injury which gave rise to the instant action, brought under the Federal Employers Liability Act, 45 U. S. C., § 51-60, and the Safety Appliance Act, 45 U. S. C., § 1-16.

While sitting at the north side of the caboose, with his head out the window, looking over his train as it moved westwardly at a 10-mile per hour speed through the Buffalo yards, petitioner sustained a laceration in the region of his right temple from a flying object, and fell back into the caboose unconscious. Immediately after the accident petitioner was taken to Millard Fillmore Hospital, at Buffalo, where he was treated for the laceration and for concussion, and discharged after four days. About a week later, and again in January, 1957, petitioner was admitted to St. Vincent's Hospital, at Erie, for tests. Up to the time of trial, approximately a year and a half after the accident, petitioner was never bed-ridden, except for the brief periods of hospitalization above referred to. Several months after the accident petitioner developed a cataract in his right eye, and also claimed after-effects from his head injury, which were open to serious question. By reason of his claim of intermittent headaches and dizzy spells, he never returned to work, although his own neuro-

psychiatric expert admitted that his only clinical finding on examination of petitioner was tenseness and nervousness (T. 125). Petitioner admittedly had been tense and nervous most of his life (65a). Petitioner was never forced to wear glasses, and at the trial testified "I have very good eyes" (69a).

Eight days after the accident, following his return to Erie, petitioner gave a 20-page statement, recorded in question and answer form by an Erie County Court reporter, to a New York Central Claim Agent. Petitioner then stated he did not know what hit him, but when pressed to give his opinion, petitioner replied, "I think it was part of a brake shoe that ricocheted off the rail and hit me" (92a). In response to questions, petitioner also then stated that he did not know of anything defective about the train and that it was operating in good shape (93a).

Claiming "retrograde amnesia" from the accident, petitioner contended that his memory subsequently returned. About two months after the accident, petitioner for the first time said he remembered being hit by a piece of brake shoe. In his complaint filed on June 19, 1957, petitioner alleged in paragraph 3:

> "On or about December 5, 1956, pursuant to the duty he owed this defendant, he was looking out of the side window of the caboose *when suddenly a part of a brake shoe on one of the cars of said train broke and struck him on the forehead above the right eye.*"

In his sworn answer to interrogatories filed December 12, 1957, petitioner stated:

> "The *brake shoe part* come out of the area of either the trailing trucks of the third car, or the lead trucks of the second car from the caboose. Plaintiff will be relied upon to prove such fact."

At his pre-trial deposition given on April 25, 1958, petitioner positively testified that he had been hit by a piece of brake shoe. At the pre-trial conference, a few days before the trial which began on May 27, 1958, petitioner's counsel stated to the Court: "He (plaintiff) will testify to it. He identifies it as a piece of brake shoe" (8a). At pre-trial, petitioner's counsel also informed the Court that he preferred to go ahead on the Safety Appliance Act alone if the Court would charge that the breaking of a brake shoe constituted a violation of the Act (20a).

At trial, petitioner's case on liability rested solely on his own testimony. His evidence was that he saw an object flying out from the region where sparks were flying, at the leading trucks of the second hind car or the trailing trucks of the third hind car—"One hundred feet or so" ahead of him (52a)—it ricocheted on the adjoining track and as it came up he recognized it was a piece of brake shoe, then it hit him and knocked him unconscious (53a).

At the time of the accident, it was a dark, rainy and misty night; there was no moon. There were no moving trains on parallel tracks and no close clearances. The caboose in which petitioner was riding was close to one of the numerous overhead street bridges at the time of petitioner's injury (Respondent's photograph—Exhibit "F"). No foreign object was subsequently found in the caboose, and inspection of the train several hours later revealed no missing or broken brake shoe. Nor did respondent's records show any subsequent repairs having been made to the cars of the particular train.

The Trial Judge affirmed petitioner's points predicated upon a broken brake shoe constituting a violation of the

Safety Appliance Act; and refused petitioner's point, based on res ipsa loquitur. In so doing, the Court commented: "In this case we don't have any evidence of anything other than the brake shoe" (108a), and added: "If he equivocated, and said 'it came from there, but I am not sure whether it is a brake shoe or what it was,' we would have a different thing. He says brake shoe period." Petitioner's counsel made no reply; gave no reason why the point should be affirmed, or why he objected to the Court's ruling; and simply took exception thereto, later on, at the end of the discussion.

The Court at no time intimated that petitioner's counsel was to be in any manner restricted in his summation concerning the effect to be given to petitioner's testimony. Nevertheless, petitioner's counsel in his closing address at no time even suggested that something other than a brake shoe might have caused petitioner's injury. He stated in effect that the Safety Appliance Act—creating absolute liability upon the breaking of a brake shoe—"is the law with which you are to be concerned" (T. 406).

At the conclusion of the Court's charge, when asked whether he had any additional instructions or corrections to make, petitioner's counsel replied in the negative and simply excepted to the refusal of his point on res ipsa.

After deliberating for some time, the jury returned with this question: "If we find the Railroad not negligent, can we still award damages to Mr. Masterson for the reason he was injured while an employee of the Railroad; and they should be held responsible for his injury?" (119a). The Court then reiterated his instructions on the Safety Appliance Act and repeatedly told the jury that the breaking of a brake shoe, as testified to by petitioner, would

entitle him to a verdict without regard to any question of negligence. No exception was taken to the additional instructions on behalf of petitioner. Subsequently the jury returned with a verdict for respondent, upon which judgment was entered.

Petitioner's Motion for New Trial was refused, and the Court of Appeals for the Third Circuit affirmed the action of Judge Joseph P. Willson.

Reasons For Not Granting The Writ

Introductory

It is respectfully submitted that a Writ of Certiorari would be improvidently granted in the instant case for the following reasons:

(1) No important question of federal law, not settled by this Court, has been decided by the Court of Appeals. On the contrary, the proper scope of the res ipsa loquitur rule was decided in *Sweeney vs. Erving*, 228 U. S., 233; 33 S. Ct., 416, recently cited with approval in *Jesionowski vs. B. & M. R. R.*, 329 U. S., 452; 67 S. Ct., 401, where Mr. Justice Black, speaking for the majority of this Court, referred to *Sweeney vs. Erving* as "a decision which cut through the mass of verbiage built around the doctrine of res ipsa loquitur".

(2) No issues are presented, the settlement of which is important to the public as distinguished from the parties here involved. The record in the instant case shows that it was tried exactly as petitioner and his able and experienced counsel—a specialist in the F. E. L. A. field of litigation—wanted it tried. Only after the jury returned its verdict for respondent, has petitioner in turn requested

the Trial Judge, the Court of Appeals, and now this Court, to do what neither petitioner in his testimony nor counsel in his argument, asked the jury to do—disbelieve petitioner's positive identification of the cause of his injury, as a basis for invoking res ipsa loquitur.

(1) Res ipsa loquitur is inconsistent with petitioner's position throughout the trial, and with all of his proof pointing to one specific cause of his injury.

Petitioner's point for charge, based on res ipsa loquitur, was refused by the Trial Judge because, as stated in his opinion denying petitioner's motion for new trial, it was

> "inconsistent with the allegations in the Complaint, as well as inconsistent with the position taken by plaintiff and his experienced and able counsel throughout the trial, and finally because not warranted by the evidence introduced during the trial."

In our Statement, it has already been pointed out that from the time petitioner filed his Complaint up to and including the final summation of his counsel, there was not the slightest deviation from petitioner's original theory—namely, that liability should be imposed upon respondent railroad because petitioner was struck by a piece of flying brake shoe and nothing else, which he saw and identified before it struck him. Not once did petitioner equivocate by saying he "thought" it was a brake shoe; or "it looked like" a brake shoe; or it was his "impression" that it was a brake shoe. Instead, on more than a dozen occasions (33a, 47a, 48a, 49a, 50a, 52a, 53a, 54a) petitioner unequivocally identified by the flying object as from a brake shoe; and also gave a like history to his medical witnesses.

(2) Petitioner's entire case was presented on the basis of a Safety Appliance Act violation alone, pursuant to counsel's pre-trial assurance to the Court.

The pre-trial notes clearly indicate that at that time petitioner's counsel's primary concern, in view of the absence of any precedent, was whether the Trial Judge would hold that if petitioner was struck by a piece of brake shoe, as he claimed, it would constitute a violation of the Safety Appliance Act. This is made crystal clear by the following colloquy at pre-trial (18a):

> "The Court: I assume Mr. Gaines is going to talk about res ipsa.
>
> Mr. Gaines: I am going to claim that it is a violation of the Safety Appliance Act, that there was an inefficient brake.
>
> If the Court please, we shall also have testimony, if need be, that this breaking of the brake shoe was occasioned by a worn-out condition of the brake shoe and which could have been readily ascertained by an inspection. (No such proof was offered by petitioner at the trial.)
>
> *Lawyers have been chastised by the Supreme Court for pleading a violation of the Safety Appliance Act and negligence, that negligence adds nothing whatsoever, because it is absolute. The Supreme Court has taken occasion to chide us.*"

At 19a it shows:

> "Mr. Gaines: The Safety Appliance Act requires a brake to be efficient. The brake shoe is an integral part of the brake mechanism. *A brake shoe comes into contact with a wheel, when there is no occasion for it so to do, and meets the wheel so as to emit sparks and then break off,* is in our view an inefficient brake, within the meaning of the Federal Safety Appliance Act, Section 11."

Again, at 20a, appears the following:

> "The Court: What about the inference of negligence, under res ipsa?

Mr. Gaines: Assuming now that credit be given the plaintiff's story and that the jury finds that this was a piece of a brake shoe which broke off, and if the court charges that if the jury finds it was a piece of a brake shoe this was an efficient brake—

The Court: Do you want to hang your hat on that, on the Safety Appliance Act, rather than negligence under the F. E. L. A.? Is that what you are saying now?

Mr. Gaines: *If your Honor will charge as I have indicated to you, then I would prefer to go ahead on the Safety Appliance Act.* If your Honor is of the view that the breaking of a brake shoe in the circumstances of this case does not constitute—

The Court: I think the breaking of the brake shoe makes it a Safety Appliance Act case. But—

Mr. Gaines: Then I would prefer to move ahead on that."

Finally, at 21a, we find:

"Mr. Sieber: Doesn't the court have to charge on both?

The Court: Not if counsel don't want it, I don't. If you want to submit it on one, I will.

Mr. Gaines: The answer to that, your Honor, lies in this: If the jury believes that it was a piece of a brake shoe which struck him, the plaintiff gains nothing by establishing negligence when the court charges that is a violation of the Safety Appliance Act. All one does in those circumstances is to clutter up a record. *I think the Supreme Court is right when it observes that if it be a Safety Appliance Act case then negligence has no place in this whole matter.*

If the jury disbelieves him, if this was not a piece of a brake shoe, he must fail, patently.

The Court: O. K.

Mr. Illig: That is what it amounts to.

Mr. Gaines: Do I make myself clear?

The Court: He makes positive identification of its being a brake shoe.

Mr. Gaines: That is right. He doesn't say it was anything else."

Despite the unequivocal statements of petitioner's counsel above quoted, petitioner makes the bald assertion, at page 10 of the Petition for Writ:

> "The (Pre-trial) discussion brought no definitive agreement on the matter of res ipsa loquitur."

Petitioner seeks to bolster his contention by quoting the Court's observation, "That depends on testimony; you can't rule on that in advance" (22a); but the record clearly shows that the above statement of the Court immediately followed a discussion as to how petitioner expected to prove his claim of "retrograde amnesia," and was made solely with reference thereto.

It is also stated in the Petition for Writ that at the time of pre-trial neither petitioner nor his counsel knew that in the interview of December 13, 1956, petitioner had ventured the "opinion" that the object which struck him was a piece of a brake shoe. However, the Notes of Pre-Trial Proceedings (23a) indicate the opposite. In fact, petitioner's counsel then showed that he was aware of the exact words uttered by petitioner on December 13, 1956 when he said with reference to the statement then made:

> "Mr. Gaines: He (Petitioner) didn't know what it was, but he says 'I think it was part of a brake shoe'. His mind was beginning to reassert itself." (24a)

The petitioner himself was present in the Court's chambers throughout the pre-trial conference. If a party, speaking thus through his counsel, may—for no reason other than disappointment in an adverse verdict—completely repudiate such positive assurances given to the Trial Judge at pre-trial, then surely the basic purpose of pre-trial procedure has been completely thwarted.

The question asked at page 12 of the Petition for Writ, "Would petitioner thereby be precluded from amending

his position prior to trial?" is purely rhetorical, for, as pointed out by the District Judge in his opinion (121a):

> "At the trial plaintiff's counsel opened to the jury and plaintiff's case was tried on the theory that plaintiff positively identified the object which struck him as part of a brake shoe which came from the trucks under the cars of the train some little distance ahead of the caboose."

Unquestionably, the following practical considerations influenced petitioner and his counsel in trying his case solely under the Safety Appliance Act:

(a) All the jury had to do in order to find for petitioner was to accept his testimony; and both petitioner and his counsel felt that that was a foregone conclusion.

(b) If petitioner's testimony had in any way reflected (as a basis of res ipsa) what is now contended—only after verdict—that his "idea", expressed 8 days after the accident, may have blossomed into an honest, though *wrong*, belief 42 days later, petitioner himself would have thereby invited the jury to speculate on other possible causes of his injury, many of which would not—as would a broken brake shoe—be directly under the exclusive control of the Railroad.

In this connection, it is important to bear in mind that Garn, a fellow trainman, was seated at the opposite side of the caboose from petitioner, also looking out the window. It was evident from Garn's testimony that the caboose at the time of the accident was in the immediate vicinity of one of the two nearest overhead street bridges shown in Respondent's Exhibit "F", reproduced in the Appendix hereto. Petitioner realized that respondent would not be liable if some third person had dropped or thrown an object from a highway bridge, which struck petitioner, or if some

boy had thrown a rock or stone at the passing train, in the absence of additional evidence, lacking in the instant record, pointing to respondent's negligence.

(c) At the trial petitioner sought to enhance his alleged head injury by his claim of "retrograde amnesia". It is significant that the term does not appear even once in petitioner's brief before the Court of Appeals nor in the Petition for Writ of Certiorari addressed to this Court. If petitioner at first didn't know that he was struck by a brake shoe because in fact it was something else (as the jury would be apt to believe, under res ipsa), then, since petitioner couldn't forget what he never knew, his claim of retrograde amnesia—to which a great deal of significance was attributed by his neuro-psychiatric expert—would fall of its own weight, and petitioner's claim for damages would be greatly impaired in the eyes of the jury.

Actually, petitioner's alleged amnesia served a twofold purpose from his standpoint: It not only bore on the question of damages; but it explained why petitioner could positively identify the flying object as a piece of brake shoe, when for some time after the accident he had said he did not know what hit him.

But the pertinent question remains: If petitioner is now sincere in saying that he may have been mistaken as to what hit him (page 8, Petition for Writ), how is this consistent with what he told the doctors—namely, that he at first forgot but subsequently remembered what it was, thereby laying the groundwork for his claim of amnesia? (See opinion of District Court, 121a.)

(3) Where, as here, there was direct and positive evidence of the cause of plaintiff's injury, res ipsa loquitur was inapplicable.

It is settled law that in an admitted res ipsa loquitur situation, if a plaintiff's proofs establish the exact accident cause, no election to rely on res ipsa loquitur is possible. In the leading case of *Sweeney vs. Erving*, 228 U. S., 233, 240; 33 S. Ct., 416, 418, cited in *Jesiownowski vs. B. & M. R. R.*, 329 U. S., 452; 67 S. Ct., 401, the Supreme Court said:

> "In our opinion res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence *where direct evidence of it may be lacking* * * *"

As was pertinently pointed out by the Trial Judge (123a):

> "In the instant case if is obvious, of course, that direct evidence of what caused plaintiff's injury is not lacking. The request as submitted is therefore inconsistent with all of the evidence in plaintiff's case, that is, as to the point where the request says * * * that something which was part of the train * * * struck the plaintiff directly injuring him * * *."

Here petitioner had already unequivocally identified the "something which was part of the train" as a piece of brake shoe; and there was not a scintilla of other evidence, direct or circumstantial, which could give rise to the inference that something other than a brake shoe, in the exclusive control of respondent, caused his injury. On this posture of the record, therefore, there was no room for application of res ipsa, for the reason, as stated in *38 Am. Jur., Negligence, Section 303*:

> "The doctrine of res ipsa loquitur has no application where all the facts and circumstances appear in evidence. Nothing is then left to inference, and the *necessity* for the doctrine does not exist. Being a rule

of necessity, it must be invoked only where evidence is absent and not readily available. It is not to be invoked when the evidence is available, and certainly not when it is actually presented." See 33 A. L. R. 2d, 810.

"Res ipsa loquitur is a procedural rule as to evidence. It is never valid in the face of facts which adequately explain the occurrence.": *Orr vs. Southern Pacific Company*, 226 Fed. 2d, 841 (9).

(4) There was no proof of a Safety Appliance Act violation except petitioner's testimony; hence, if his testimony were as equivocal as now claimed, his case could not have been submitted under the Safety Appliance Act.

In his opinion (123a), the Trial Judge put his finger squarely on the fundamental weakness of petitioner's position, when he said:

"Plaintiff took out of the case the very point which he now claims as error. To disregard plaintiff's identification of the object that struck him, means to engage in mere speculation as to the cause of plaintiff's injury. The result is that the very point which plaintiff now contends should have allowed him to go to the jury under the doctrine of res ipsa, took him to the jury under the Safety Appliance Act."

Solely on the basis of petitioner's positive testimony that a brake shoe caused his injury, petitioner's case was submitted—and correctly so, as petitioner admits—to the jury under the Safety Appliance Act. But if petitioner did not know what struck him, as petitioner now argues in effect, by contending that something other than a brake shoe, in the exclusive control of defendant, may have caused his injury, the jury should not have been permitted to find a violation of the Safety Appliance Act, as it was, under the Court's instructions. Admittedly, apart from petitioner's testimony, there was no other evidence in the case, direct or circumstantial, of any defective safety appliance. In short, if, as petitioner now contends, he could not see

what hit him because the accident happened so suddenly in the darkness, he would have no knowledge where it came from; and there would have been no basis in such event for the Court to have submitted petitioner's case under the Safety Appliance Act.

In fairness to the Trial Judge, under the requirements of Federal Rule 51, it should not be overlooked that at no time subsequent to the pre-trial conference, until after verdict, did petitioner's counsel ever hint at the possibility that petitioner might have been hit by something else, other than a brake shoe, under the exclusive control of respondent. Petitioner's counsel offered no reason whatever why his point under res ipsa (which was utterly inconsistent with his previously stated position) should be affirmed, even after the Court plainly indicated that his ruling on res ipsa would have been different "if he (petitioner) equivocated, and said 'It came from there, but I am not sure whether it is a brake shoe or what it was,' we would have a different thing. He says brake shoe period" (103a). Petitioner's counsel remained silent. The Court had already acquiesced in petitioner's points for charge under the Safety Appliance Act; and petitioner's astute counsel undoubtedly realized that he would be in an untenable position were he to urge res ipsa on the basis of the uncertainty and equivocal nature of petitioner's testimony, since he well realized that petitioner's testimony had to be—as it was—definite and positive concerning a Safety Appliance Act violation, in the absence of any other proof that such violation had occurred.

In *O'Donnell vs. Elgin, J. & E. Ry. Co.*, 338 U. S., 384, 70 S. Ct., 200, as in the case at bar, petitioner in the same paragraph pleaded a violation of both the F. E. L. A. and the Safety Appliance Act. There, petitioner's case

was tried on the theory that the decedent met his death as the result of the breaking of a coupler. In the *O'Donnell* case, as in the case at bar, petitioner's case was submitted to the jury only on the Safety Appliance Act. (See opinion in Court of Appeals, 171 Fed. 2d, 973, 974.) Here, as previously pointed out, petitioner's case was pleaded and tried solely on the theory that a piece of brake shoe caused his injury; but in the *O'Donnell* case, petitioner was not given the benefit of the peremptory instruction that a coupler which broke was a violation of the Safety Appliance Act, which would render the Railroad absolutely liable. Here, on the other hand, the Trial Judge carefully followed the Supreme Court's admonition in the *O'Donnell* case, and clearly so charged the jury.

(5) The mere fact that the jury tried to find a basis on which to compensate the petitioner, aside from the applicable law, is no reason for setting aside its ultimate verdict for respondent.

In connection with petitioner's criticism of the jury's question and the Court's answer thereto, it should be noted initially that petitioner in his motion for new trial did not contend either that the verdict was against the weight of the evidence or against the law as given by the Court.

On petitioner's motion for new trial, respondent, having the verdict, is entitled to have the evidence viewed in the light most favorable to respondent: *Conner vs Pennsylvania Railroad*, 163 Fed. Supp., 718 (Pa.); every fact which might be found or reasonably inferred from the evidence must be regarded as having been found favorably to respondent: *Wild vs. Atlantic Refining Co.*, 195 F. 2d, 151 (3).

Turning now to the question propounded by the jury, one point stands out clearly—the jury was searching for

a way to compensate petitioner. Hence, in view of the jury's sympathetic attitude toward the petitioner thus plainly manifested, it is a fair inference that the jury had already *rejected* petitioner's testimony concerning the cause of his injury or they would have promptly returned a verdict for him on the basis of the railroad's absolute liability under the Safety Appliance Act.

But since there was not even a scintilla of evidence of other negligence or misconduct on the part of the railroad in the entire record, once the jury concluded that the object which struck petitioner was not a part of a brake shoe, there was nothing else before them on which they could predicate any negligence of the respondent. Accordingly, the jury sought advice as to whether, nevertheless, they could find for petitioner on a Workmen's Compensation theory.

The Court then reiterated his previous instructions as to absolute liability imposed by violation of the Safety Appliance Act and stated not once, but twice, that if the brake shoe broke, as petitioner testified, he was entitled to a verdict irrespective of any question of negligence. *Petitioner's interests were protected by his counsel, who was present at the time and who apparently was perfectly satisfied with the Court's instructions since he took no exception to the additional instructions given.* Even had the Court then erred—which, it is submitted, that he did not—it would now be too late for petitioner to complain, since the alleged error would not be reviewable: *Macartney v. Compagnie Generale Trans Atlantique*, 253 F. 2d, 529 (9).

Furthermore, since the jury resumed deliberations *after* the Court's additional instructions, specifically directed to the absolute liability imposed under the Safety Appliance

Act, there is no basis for petitioner's present contention that the jury's ultimate verdict was on the basis of their consideration of negligence.

CONCLUSION

Respondent's position may be summarized as follows:

1. Petitioner's request for a charge on res ipsa loquitur was utterly inconsistent with petitioner's pleadings, with his deposition, with his position as stated at pre-trial, with petitioner's testimony, and with all the evidence at the trial concerning the cause of his injury.

2. Petitioner's counsel indicated most firmly at pre-trial, and in his opening and closing addresses, that he did not *want* to rely on res ipsa loquitur inasmuch as the Court adopted his view that petitioner's testimony would establish a violation of the Safety Appliance Act; now he has reversed himself.

3. Petitioner having established the exact accident cause by his positive identification of a brake shoe as the object which struck him, had no right to invoke the res ipsa loquitur doctrine.

4. Petitioner's case was submitted to the jury under the Safety Appliance Act solely on the basis of petitioner's positive, uncorroborated testimony concerning a specific violation of the Act. Now, by invoking res ipsa, and contending that something else, under the exclusive control of respondent, *may* have caused petitioner's injury, petitioner is taking out of the case the vital element which permitted him to go to the jury under the Safety Appliance Act.

5. Since the jury returned its verdict only after additional instructions on the applicable law, the Safety Appliance Act, to which no exception was taken by petitioner,

petitioner cannot justifiably contend that the jury's ultimate verdict was based on a consideration of negligence.

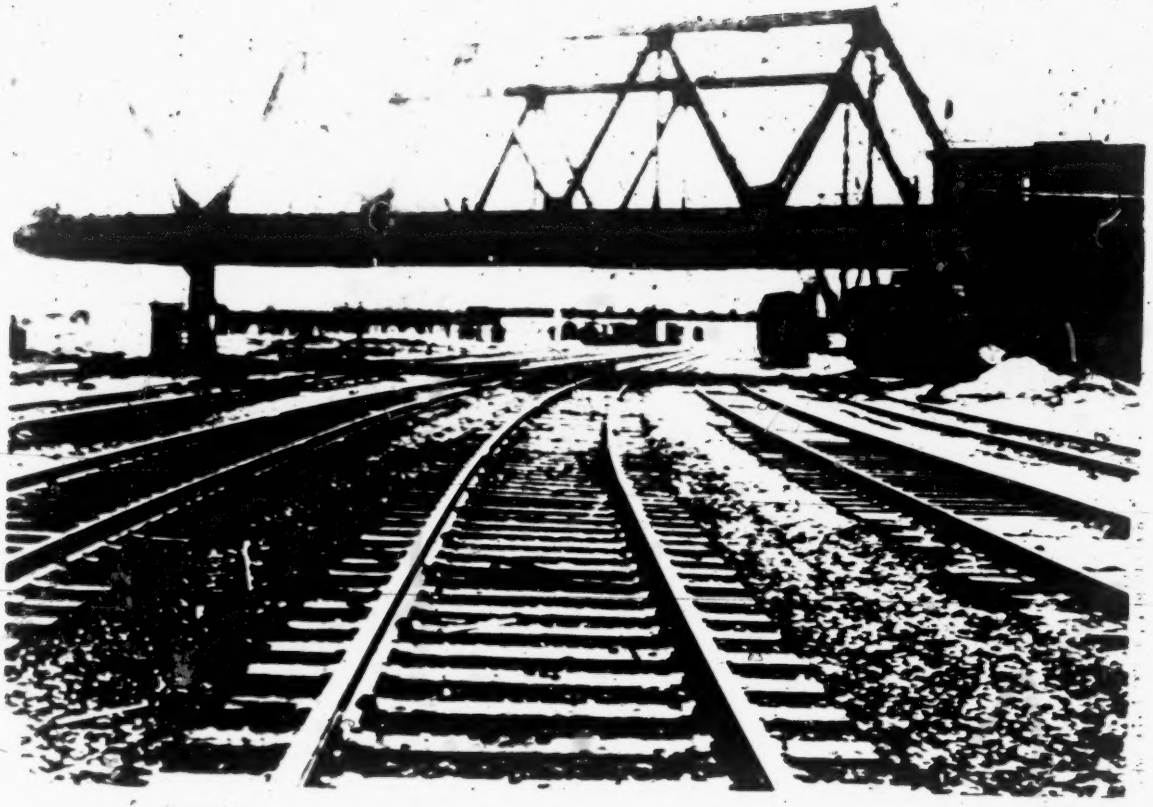
As the Supreme Court said in *Tennant vs. Peoria & P. U. Railway Co.*, 321 U. S., 29, 64 S. Ct., 409:

> "It is the jury, not the Court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (Citing cases.) That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because Judges feel that other results are more reasonable."

WHEREFORE, for the foregoing reasons, this appeal should be dismissed.

Respectfully submitted,

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

No. 252.

OCTOBER TERM, 1959.

JOSEPH D. MASTERSON,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Respondent asserts that petitioner at pre-trial confined his position to a claim of Safety Appliance Act violation, wherefore he precluded himself from relying upon the res ipsa doctrine. Petitioner asserts that there was no definitive agreement or assurance at pre-trial anent the theory upon which the case was to be tried.

At pre-trial, to be sure, there was discussion anent such theories. It was pointed out that the petitioner at trial would identify the object as a piece of a brake shoe. As to whether such identification made it a Safety Appliance Act case, the court said:

> "The Court: Then it is in the case. It might have been something else, which he could go to the jury on, and the railroad has to show—in other words, he goes to the jury on res ipsa.
>
> Mr. Illig: Oh, no, your Honor. I respectfully disagree.

The Court: If he is looking out that car window and he is hurt by a flying object, I think it is up to the railroad to explain. I think he can get to the jury under F.E.L.A.

Mr. Illig: I think we are going to have a legal argument on that.

The Court: You see your friend Justice Brennan at the Judicial Conference and he will go along with that theory. He wrote all those opinions.

Mr. Illig: You spoke about retrograde amnesia. I haven't heard you mention any witnesses that you expect to call to prove this retrograde amnesia.

Mr. Gaines: Dr. Gould.

Mr. Illig: You didn't mention you were calling him.

Mr. Gaines: Yes, I did. I am sure that I did.

Mr. Illig: The only witnesses I have down here are the plaintiff and the hospital records, Dr. Gans, Dr. Joy, and nothing about Dr. Gould.

Mr. Gaines: I mentioned Dr. Gould.

Mr. Illig: You mentioned him, but not as a witness.

Mr. Gaines: I specifically mentioned him. You probably missed it.

The Court: That depends on testimony. You can't rule on that in advance. Anything further, gentlemen? Any information you want, now, Mr. Gaines, from the defendant?" (21a, 22a.)

We submit respectfully that the court's observation, "That depends on testimony. You can't rule on that in advance," referred to the matter of res ipsa, and not to the identity of a medical witness.

Had any specific pre-trial agreement or assurance been made, would not the trial court have reminded petitioner's counsel of such agreement or assurance at the time that petitioner presented the rejected request to charge?

Petitioner's counsel is taken to task by respondent for not insisting aggressively that the trial court give the re-

quested charge on res ipsa. Perhaps counsel might have been more insistent. It seemed clear, however, that nothing was to be gained by pursuing the point more insistently at that juncture. Certainly, failure to be more aggressive was not tantamount to a waiver of error.

Respondent asserts that the trial court did not intimate that petitioner's counsel was to be in any manner restricted in his summation concerning the effect to be given petitioner's testimony. By the trial court's ruling on the requested charge on res ipsa, petitioner's counsel, indeed, was restricted concerning the effect to be given petitioner's testimony.

Respondent argues that petitioner did not "equivocate by saying 'he thought' it was a brake shoe, or 'it looked like' a brake shoe, or 'it was his impression' that it was a brake shoe." In the circumstances of this case, could petitioner's testimony amount to anything more than the equivalent of "I thought" it was a brake shoe, or "it looked like" a brake shoe? Petitioner freely admitted that for some fifty days immediately following the occurrence, he had repeatedly stated that he could not identify the flying object which struck him. Eight days after the occurrence, unrecalled by him, he apparently had given his opinion that it was a part of a brake shoe that struck him. Identification was possible only by impression gained during a fleeting moment under unfavorable conditions of light and weather. There was no opportunity for careful scrutiny.

Clearly, then, any recollection of the flying object necessarily would have to be limited to the equivalent of "I thought" it was a part of a brake shoe or it "looked like" a part of a brake shoe.

Respondent asserts that petitioner's counsel, "in his opening and closing addresses," neither of which appears in the Joint Appendix, indicated that he did not want to

rely on res ipsa loquitur. This is a wholly unwarranted statement. The very fact that petitioner's counsel requested a charge on res ipsa loquitur before argument and summation would seem to be sufficient to show that the statement is without basis in fact.

Respondent argues that the identification by petitioner established the exact accident cause and therefore he had no right to invoke the res ipsa loquitur doctrine.

It was respondent who argued successfully to the jury that petitioner, largely on the basis of his own testimony, had not established the exact cause of the accident by his identification of the object as a piece of a brake shoe.

On the Record in this case, the jury could have found that though not a piece of a brake shoe, the object which struck petitioner came from a part of the train under respondent's exclusive control, and failing an adequate explanation by respondent, the jury could have drawn the inference of respondent's negligence.

The jury, however, was not permitted to weigh the inferences of negligence which could arise from the jury's acceptance of such testimony.

Respondent, in effect, argues that the unsuccessful attempt by petitioner to present by direct testimony the precise cause of his injury estops him from relying on res ipsa loquitur.

The Supreme Court of the United States has never stated any such proposition of law.

We submit that where, as in the case at bar, at the close of all the testimony, the cause of injury does not clearly appear, the petitioner ought not to be estopped from relying upon the doctrine of res ipsa loquitur. In such circumstances, he should have been permitted to argue the case upon the whole testimony, and the trial

court should have charged on res ipsa loquitur in conformity with the trial court's own observation made at pretrial that submission to the jury under both the Safety Appliance Act and res ipsa could be made. (21a.)

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 252

OCTOBER TERM, 1959

JOSEPH D. MASTERSON,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

RESPONDENT'S REPLY BRIEF

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RESPONDENT'S REPLY BRIEF

I.

In order to focus on the essentials, we believe it is necessary to state the key points in the instant case that are not controverted by petitioner in his Petition for Writ or Reply Brief:

(1) At no time prior to verdict, did petitioner urge that his positive identification of the cause of his injuries should be disregarded, as a basis for invoking *res ipsa loquitur*.

(2) Petitioner is unable to point to a single word in petitioner's testimony at variance with his counsel's pre-trial assurances to the Trial Judge with respect to peti-

tioner's positive identification of the object which struck him.

(3) Petitioner's testimony and that of his neuro-psychiatric expert coincide with his counsel's pre-trial statements (8a, 9a, 21a) that plaintiff knew, but at first could not recall what struck him, by reason of "retrograde amnesia". Now petitioner has reversed himself, and argues in effect that his initial inability to identify the flying object resulted not from amnesia but from faulty observation.

(4) Petitioner does not dispute the fact that his case was submitted to the jury under the Safety Appliance Act solely on the basis of his own testimony, nor that the Trial Judge correctly ruled in petitioner's favor that if petitioner was struck by a brakeshoe, as claimed by him, it would constitute a violation of the Safety Appliance Act for which respondent would be absolutely liable. Likewise, petitioner does not contend that he would be entitled to recover under the Safety Appliance Act if the jury disregarded his testimony, since there was not a scintilla of other evidence in the case pointing to a Safety Appliance Act violation. But because the jury disbelieved him, petitioner chooses to ignore the obvious conclusion that if his testimony were as equivocal as now claimed, petitioner should never have been permitted to go to the jury under the Safety Appliance Act in the first place.

II.

However, the key to petitioner's main argument is reiterated at page 1 of his Reply Brief:

> "Petitioner asserts that there was no definitive agreement or assurance at pre-trial anent the theory upon which the case was to be tried."

In our Brief in Opposition, at pages 9 and 10, it has already been emphasized that at pre-trial petitioner's counsel sought a favorable ruling on his contention that the mere breaking of a brakeshoe constituted a violation of the Safety Appliance Act—a legal issue without precedent. This was evident by his offer to prove "*if need be*, that this breaking of a brakeshoe was occasioned by a worn out condition of the brakeshoe * * *", which offer was never followed up by proof.

Once having obtained the Trial Judge's assurance that petitioner's case would come under the Safety Appliance Act if positive identification of the flying object as a piece of brakeshoe were made, petitioner's counsel—with petitioner present—categorically stated that such positive identification would be forthcoming, and that negligence had nothing to do with petitioner's case.

Could anything be more unequivocal than the following statements by petitioner's counsel at 21a:

> "Mr. Gaines: If the jury believes that it was a piece of a brake shoe which struck him, the plaintiff gains nothing by establishing negligence when the court charges that is a violation of the Safety Appliance Act. All one does in those circumstances is to clutter up a record. *I think the Supreme Court is right when it observes that if it be a Safety Appliance Act case then negligence has no place in this whole matter.*
>
> *If the jury disbelieves him, if this was not a piece of a brake shoe, he must fail, patently.*
>
> The Court: O. K.
>
> Mr. Illig: That is what it amounts to.
>
> Mr. Gaines: Do I make myself clear?
>
> The Court: He makes positive identification of its being a brake shoe.
>
> Mr. Gaines: That is right. He doesn't say it was anything else."

However, in his Reply Brief, petitioner has completely ignored the foregoing statements and instead quoted what

immediately follows. In short, the ensuing comments by the Trial Judge, quoted by petitioner in his Reply Brief, pertain to a hypothetical situation different from that already stated by petitioner's counsel with respect to the testimony to be given by petitioner.

Not only did petitioner's counsel categorically state at pre-trial that he preferred to go ahead under the Safety Appliance Act alone, but conversely, he at no time contended, as he does now, that *res ipsa loquitur* was also in issue. And it cannot be overemphasized that petitioner's actual testimony concerning the cause of his injury was no less positive and definite than his counsel had assured the Trial Judge it would be.

The pre-trial conference has been hailed as one of the best innovations of Twentieth Century Law. By way of illustration, Mr. Justice Brennan in a June, 1957, article published in the American Bar Association Journal Volume 43, page 499, said.

> "In pre-trial procedure, made effective through a precedent broad discovery practice, lies the best answer yet devised for destroying surprise and maneuver as twin allies of the sporting theory of justice."

If that be true, then disappointment in an adverse verdict cannot justify petitioner in subsequently attempting to maneuver into a position previously abandoned by him—by repudiating the positive pre-trial assurances given to the Trial Judge.

A most persuasive authority upholding respondent's position in this regard is *Barry vs. Reading Company* (D. C. N. J.) 3 F. R. D. 305, affirmed (C. A. 3d) 147 Fed. 2d 129, certiorari denied at 324 U. S. 867, 65 S. Ct. 912.

There, as here, action was brought under the Federal Employers' Liability Act and the Safety Appliance Act.

At a pre-trial conference, plaintiff's counsel specifically stated that the facts in the case were not in dispute except as to whether the hand brake on the railroad car was defective and that this question was the only issue in the case. At the conclusion of the trial, plaintiff's counsel asked the Court to charge that decedent was entitled to be provided with a reasonably safe place in which to perform his work, relying on certain testimony given by a fellow employee of decedent. The Court refused to so charge, stating that the issue involved in the case was whether the hand brake was ineffective and inefficient and that the jury had been told that there was an absolute duty on the part of the defendant to provide effective and efficient hand brakes on its railroad cars. Plaintiff's counsel took exception to this refusal to charge and it was this point which was emphasized in plaintiff's motion for new trial following a verdict for defendant.

Plaintiff contended that negligence should have been charged for defendant's failure to provide decedent with a reasonably safe place to work and that recovery for such negligence was possible under the FELA even though there was no finding of an ineffective hand brake.

In his opinion refusing plaintiff's motion for new trial, Judge Forman (recently elevated to the Court of Appeals for the Third Circuit) said:

> "To set aside the verdict of the jury and permit a new trial on the basis of the contentions of the plaintiff would be to completely nullify the purpose and effect of the Federal Rules of Civil Procedure with respect to pleadings and pre-trial procedure."

What Judge Forman subsequently commented in his opinion is likewise most pertinent here:

"Plaintiff's present complaints are rather complete afterthoughts never contemplated at seasonable times during the trial."

For the foregoing reasons, the respondent prays that the writ of certiorari be denied.

Respectfully submitted,

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